



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-84-98

FACTS:

You are an elected member of the ABC School Committee (Committee) and its chairman. Your daughter is an elementary school teacher in the ABC school system. Two other members of your seven member committee also have relatives in the system; one has a mother who is a teacher, and the other has a husband who teaches and is a department head.

QUESTION:

To what extent does G.L. c. 268A restrict the participation of these members in teacher-related matters which come before the school committee?

ANSWER:

School committee members who have immediate family members teaching in the school system are subject to the following restrictions.

DISCUSSION:

As elected members of the school committee you are municipal employees and therefore are subject to the provisions of G. L. c. 268A, the conflict of interest law. The sections of that law which are relevant to your questions are s.s.19 and 23. Section 19(a) provides in pertinent part that no municipal employee may participate as such an employee in any particular matter^[1] in which he or a member of his immediate family^[2] has a financial interest. The objective of this provision is to eliminate in advance the pressure that otherwise might be brought to bear on public employees when faced with situations where there are competing public and private considerations.^[3] Because the term "financial interest" is not defined in the statute, the Commission has the responsibility for interpreting it, and in doing so is required to give it a workable meaning. See *Graham v. McGrail*, 370 Mass, 133, 140 (1976); EC-COI-83-114; 83-107.^[4] Bearing in mind this requirement, the Commission reaches the following conclusions. Because there is no language in s.19(a) modifying the term, "financial interest" is not limited to those interests which are significant or substantial. This conclusion is bolstered by s.19(b) which exempts from the s.19(a) prohibition a municipal employee who discloses in advance to his or her appointing official the existence of a financial interest if the appointing official makes a determination that "the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee."^[5] It is not for the employee to

make a judgment as to the substantiality of his or her financial interest, All that is necessary to trigger s.19(a) is the existence of any financial interest, The responsibility for evaluating it falls to the appointing official.[6]

Further support for this interpretation of "financial interest" is found in s.20 where a municipal employee is prohibited from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same town, in which the town is an interested party. That section excludes from its coverage financial interests which consist of "the ownership of less than one percent of stock of a corporations" By implication, all other financial interests, no matter how insubstantial or insignificant, are covered by the prohibition.

A second issue involving the interpretation of the term "financial interest" is whether it embraces those interests which might be affected at some future time, as well as those interests which actually exist at the time of the public employee's action. This is an issue separate from the substantiality question. Prior to 1963, the federal counterpart to s.19 used the words "direct or indirect" to modify financial interest.[7] In a 1961 Supreme Court case involving the existence of a financial interest, the court found a violation of the law where a government consultant who was also a director and shareholder of an investment banking firm helped to negotiate a contract between the Atomic Energy Commission and a utility company. Subsequent to the signing of that contract the utility company employed the consultant's investment banking firm to handle the public financing required for the utility project. The Court found a violation of the federal statute because the consultant's investment banking firm had an indirect financial interest in the contract between the Atomic Energy Commission and the utility company. The Court's opinion was based on the fact that because his investment banking firm had a reputation in the area of power financing. the consultant should have known that his firm "might be offered the work of arranging the financing of the project when and if a contract for the project should be made." [8] When the federal statute was amended shortly thereafter, the word "indirect" was omitted, leading to speculation that only present financial interests were contemplated.[9] There is some authority for the application of this narrower interpretation of the Massachusetts statute. In *Graham v. McGrail*, the court concluded that ". . . both the language and the policy of s.19(a) forbid a school committee member to participate in [a budget decision] when his child's private right is directly and immediately concerned." 370 Mass. at 140, Previous Commission opinions are consistent with this holding.[10]

The limiting of prohibited financial interests to those that are of a more direct and immediate nature is reasonable given the fact that an important element of a violation of s.19 is knowledge. There obviously can be no concern that a public employee's official actions will be influenced by private interests where he or she is not aware of the existence of those interests. However, where there is knowledge of the existence of private interests, and where it is obvious or reasonably foreseeable that one's private interests will be affected by one's official actions, then the provisions of s.19 are applicable.

To summarize up to this point, any financial interest, no matter how small, is enough to trigger s.19(a). However, that financial interest must be direct and immediate, or at least reasonably foreseeable. In terms of the practical application of these principles to your situation, the decision in *Graham v. McGrail* is a good starting point. School committee members may not participate in any way in the formulation, adoption or revision of any aspect of the budget or a collective bargaining strategy or position which may relate to the wages, hours or conditions of employment of any member of his or her immediate family employed by the school department.^[11] This principle must be followed both if the family member will be directly and immediately affected or if it is reasonably foreseeable that the family member's interest will be affected. Not every issue relating to wages, hours or condition of employment will automatically affect, or foreseeably affect, a family member's financial interest. For example, if a "reduction in force" provision were under consideration, the three Committee members would only have to refrain from participation if it were obvious or reasonably foreseeable that their family members were vulnerable to layoff or demotion to a lower position because of their seniority level.

Likewise with the team teaching format, Committee members need only refrain if their family member is a team teacher, has applied, or has a definite plan to apply to become a team teacher. With provisions dealing with early retirement or payment to retiring teachers for accumulated sick time, members need only refrain from participating if their family member is retiring or has specific plans to retire, or if the provision at issue will result in the vesting of some right in the family member. For example, if the provision were the availability of post-retirement insurance benefits for employees with at least fifteen years of service, any Committee member whose family member had fifteen or more years of service would have to refrain from participating.

Finally, all Committee members should be aware of the provisions of s.23 which contains general standards of conduct applicable to all public employees. It prohibits public employees from accepting other employment which will impair their independence of judgment in the exercise of their official duties [s.23(paragraph 2)(1)]; using or attempting to use their official positions to secure unwarranted privileges or exemptions for themselves or others [s.23 (paragraph 2)(2)]; by their conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are unduly affected by the kinship, rank, position or influence of any party or person. [s.23(paragraph 2)(3)]; and accepting employment or engaging in any business or professional activity which will require them to disclose confidential information which they gained by reason of their official position or authority and from using that information to further their personal interests. [s.23(paragraph 2)(1) and (2)].

Section 23 focuses not only on actual conflicts of interest but also on appearances of conflicts. Thus all members should be careful that any action they take is impartial and that there is no basis for any perception that is not. Additionally, the three affected members of the Committee should be sure that no pressure is put on the other four members to act in a way that would be beneficial to their family members in particular.

Although the filtering process the affected Committee members must go through may seem burdensome and time consuming, it is necessary to protect the integrity of the school committee's actions and to maintain the public's confidence in those actions.

DATE AUTHORIZED: August 14, 1984

[1] For the purposes of G.L. c. 268A, "particular matter" is defined as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. . G.L. c. 268A, s.1(k).

[2] For the purposes of G.L. c. 268A, "immediate family" is defined as the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, s.1(e),

[3] See W. Buss, "The Massachusetts Conflict of Interest Statute; an Analysis," 45 B.U.L. Rev. 299,301(1965).

[4] These latter two citations refer to previous Commission conflicts of interest opinions including the years they were issued and their identifying numbers. Copies of these and all other advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

[5] It should be noted that this exemption is not available to elected officials as they do not have appointing officials. See District Attorney for the Hampden District v. Grucci, 1981 Mass. Adv. Sh. 2125,2128, n. 3. In 1982, the General Court considered comprehensive legislation filed by the Commission which, in part, would have provided an exempting avenue from elected municipal officials under s.19. see, 1982 House Doc. No. 1235, s.16. This particular proposal was not approved.

[6] See also R. Braucher, Conflict of Interest in Massachusetts in Perspective of Law, Essays for Austin Wakeman Scott, (1964) at p. 25; W. Buss, "The Massachusetts Conflict of Interest Law: An Analysis," 45 B.U.L. Rev. 299, 361(1965).

[7] 18 U.S.C. s.434.

[8] See United States v. Mississippi Vally Generating Co., 364 U.S. 520,557(1961),

[9] See R.B. Perkins, "The New Federal Conflict of Interest Law," 76 Harv. L. Rev, 1113, 1134 (1963), See also Buss, supra. at 356 (spetulating that for the same reason the intent was to limit the Massachusetts statute to financial interests that are clearly in existence at the controlling time.

[10] See e.g. EC-COI-83-174 (School committee member may not participate in hiring of his child to be his administrative assistant); EC-COI-83-164 (teacher on leave of absence to serve as mayor and school committee member has financial interest in 1)

issues affecting his teacher's compensation and 2) determinations related to the retention of his position); EC-COI-82-34 (state employee who is a plaintiff in a class action suit has a financial interest in that suit where there is a possibility that money damages will be awarded).

[11] 370 Mass. at 140.